United Nations A/CN.9/814/Add.3

General Assembly

Distr.: General
13 January 2014

Original: English

United Nations Commission on International Trade Law
Forty-seventh session
New York, 7-25 July 2014

Settlement of commercial disputes

UNCITRAL Guide on the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York, 1958)

Note by the Secretariat

Addendum

Article VI

If an application for the setting aside or suspension of the award has been made to a competent authority referred to in article V(1)(e), the authority before which the award is sought to be relied upon may, if it considers it proper, adjourn the decision on the enforcement of the award and may also, on the application of the party claiming enforcement of the award, order the other party to give suitable security.

TRAVAUX PRÉPARATOIRES ON ARTICLE VI

The *travaux préparatoires* on article VI as adopted in 1958 are contained in the following documents:

1. Amendments to the Draft Convention Submitted by Governmental Delegations: E/CONF.26/L.34; E/CONF.26/L.16; E/CONF.26/L.44.

2. Summary Records of the 11th, 12th, 13th, 14th and 17th meetings of the United Nations Conference on International Commercial Arbitration.

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INTRODUCTION

1. Article VI of the Convention addresses the situation where a party seeks to set aside an award in the country where it was issued, while the other party seeks to enforce it elsewhere.

2. In this context of parallel proceedings, article VI achieves a compromise between the two equally legitimate concerns of promoting the enforceability of foreign arbitral awards and preserving judicial oversight over awards by granting courts of Contracting States the freedom to decide whether or not to adjourn enforcement proceedings.[1]

3. Article VI was not included in the early drafts of the Convention and the issues it addresses were first considered during the Conference. In turning their minds to these issues, the drafters of the Convention sought to ensure that a party wishing to frustrate the enforcement of an award could not circumvent the Convention by simply initiating proceedings to set aside or suspend the award, while at the same time limiting the risk that an enforced award would be subsequently set aside in the country in which it was made.

4. As explained by Mr. de Sydow, Chairman of Working Party No. 3 that drafted article VI: "[T]he Working Party recommended the adoption of that article in order to permit the enforcement authority to adjourn its decision if it was satisfied that an application for annulment of the award or for its suspension was made for a good reason in the country where the award was given. At the same time, to prevent an abuse of that provision by the losing party which may have started annulment proceedings without a valid reason purely to delay or frustrate the enforcement of the award, the enforcement authority should in such a case have the right either to enforce the award forthwith or to adjourn its enforcement only on the condition that the party opposing enforcement deposits a suitable security."[2]

5. Article VI may be regarded as an important step forward compared to the 1927 Geneva Convention on the execution of foreign arbitral awards under which a foreign court was required to refuse enforcement upon the mere application to set aside the award in the country where it was issued.[3] By contrast, article VI merely

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[1] See FOUCHARD GAILLARD GOLDMAN ON INTERNATIONAL COMMERCIAL ARBITRATION (E. Gaillard, J. Savage eds., 1996), at 981; Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 416 (H. Kronke, P. Nacimiento et al. eds., 2010). See also *Continental Transfer Technique Ltd v. Federal Government of Nigeria*, High Court of Justice, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm); *IPCO v. Nigeria* (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[2] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

[3] See article 1 of the 1927 Geneva Convention: "To obtain such recognition or enforcement, it shall, further, be necessary: [...] (*d*) That the award has become final in the country in which it has been made, in the sense that it will not be considered as such if it is open to *opposition*, *appel* or *pourvoi en cassation* (in the countries where such forms of procedure exist) or if it is proved that any proceedings for the purpose of contesting the validity of the award are pending; [...]." See also PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL (1965), at 535; ALBERT JAN VAN DEN BERG, THE NEW YORK

allows national courts to adjourn their decision on enforcement should they "consider it proper".[4] The same principle is provided for, in substance, in article 36(2) of the UNCITRAL Model Law on Arbitration.[5]

6. Although article VI is often raised alongside article V(1)(e), which provides that a court may refuse to recognize and enforce an award if it "has not yet become binding on the parties, or has been set aside or suspended by a competent authority of the country",[6] it covers a different situation. By adjourning the enforcement proceedings, courts seek to preserve the status quo in order to enable the application to set aside or suspend the award to be made in the country where it was issued.[7] In this sense, article VI may be regarded as "a corollary" to article V(1)(e) and as closing a "temporal gap" that exists when an action to set aside the award is pending before a competent authority.[8]

7. It took a while for practitioners to avail themselves of the possibilities offered by article VI.[9] Now, courts around the world have applied this provision with a view to promoting the objectives of the Convention by facilitating the recognition and enforcement of arbitral awards and avoiding inconsistent decisions.[10]

ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 353.

[4] The District Court of Columbia has provided the following definition of "adjourn" within the meaning of article VI of the Convention: "stay or dismiss without prejudice". See *Telcordia Technologies, Inc. v. Telkom SA, Limited*, District Court, District of Columbia, United States of America, 9 April 2004, 02-1990. See also *CPConstruction Pioneers Baugesellschaft Anstalt v. The Government of the Republic Ghana, Ministry of Roads and Transport*, District Court, District of Columbia, United States of America, 12 August 2008, 1:04-01564 (LFO); *Continental Transfert Technique Lmt. v. Federal Government of Nigeria et al.*, District Court, District of Columbia, United States of America, 23 March 2010, 08-2026 (PLF).

[5] Article 36(2) of the UNCITRAL Model Law on Arbitration provides that: "If an application for setting aside or suspension of an award has been made to a court referred to in paragraph (1)(a)(v) of this article, the court where recognition or enforcement is sought may, if it considers it proper, adjourn its decision and may also, on the application of the party claiming recognition or enforcement of the award, order the other party to provide appropriate security."

[6] For a more detailed analysis, see the commentary on article V(1)(e) of the New York Convention.

[7] *ESCO Corp v. Bradken Resources Pty Ltd*, Federal Court, Australia, 9 August 2011, NSD 876 of 2011.

[8] Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 439 (R. Wolff ed., 2012); Michael H. Strub, *Resisting Enforcement of Foreign Arbitral Awards Under Article V(1)(e) and Article VI of the New York Convention: A Proposal for Effective Guidelines*, 68 TEX. L. REV. 1031 (1989-1990), at 1047.

[9] See Pieter Sanders, *A Twenty Years' Review of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, 13 INT'L L. 269 (1979), at 273.

[10] See, for example, *Telcordia Technologies, Inc. v. Telkom SA, Limited*, District Court, District of Columbia, United States of America, 9 April 2004, 02-1990.

ANALYSIS

A. General principles

a. The requirement that an application for the setting aside or suspension of an award be pending

8. Article VI of the Convention requires that an application for the setting aside or suspension of an award "has been made" before a competent authority. In the absence of such an application, courts must refuse to adjourn the decision on the enforcement of the award.

9. Several courts have considered whether to adjourn enforcement proceedings pursuant to article VI in cases where it was not established that the pending application constituted an attempt to set aside or suspend the award. For example, the United States District Court for the Western District of Washington held that a damages claim in a second set of arbitral proceedings did not amount to an action to set aside or suspend the award within the meaning of article VI.[11] In another case, the United States Court of Appeals for the Third Circuit dismissed a request for adjournment on the grounds that an action, initiated before the same arbitral tribunal, to remedy a harm that occurred after a first award was issued did not amount to an action to set aside or suspend the award.[12] In a further case, the Supreme Court of New South Wales refused to grant an adjournment in a situation where the defendant had failed to establish that the application made before a competent authority in Sweden related to the setting aside or suspension of the award.[13]

10. Courts also require the party opposing enforcement to demonstrate that an application to set aside or suspend an award is still pending. If the application has already been dismissed, courts will refuse to adjourn the decision on the enforcement of an award.[14] By way of example, a French court denied adjournment on the ground that even though the party seeking adjournment had initiated proceedings to suspend the enforcement of the award in Italy, those proceedings had been dismissed by the Rome Court of Appeal.[15]

b. The application for the setting aside or suspension of an award must be made to a "competent authority"

11. Article VI of the Convention provides that courts may adjourn the enforcement decision if the application to set aside or suspend the award has been made in front

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[11] *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C.

[12] *Stephen and Mary Birch Foundation, Inc. v. Admart AG, Heller Werkstatt GesmbH and others*, Court of Appeals, Third Circuit, United States of America, 8 August 2006, 04-4014.

[13] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[14] *S.A. Recam Sonofadex v. S.N.C. Cantieri Rizzardi de Gianfranco Rizzardi*, Court of Appeal of Orléans, France, 5 October 2000; Debt Collection and Bankruptcy Chamber of the Court of Appeal of the Republic and Canton of Ticino, Switzerland, 9 December 2010, 14.2010.98.

[15] *S.A. Recam Sonofadex v. S.N.C. Cantieri Rizzardi de Gianfranco Rizzardi*, Court of Appeal of Orléans, France, 5 October 2000.

of a "competent authority." To determine whether this prerequisite has been satisfied, courts refer to the standards found in article V(1)(e) of the Convention.[16]

12. As pointed out in the commentary to article V(1)(e), the country under the laws of which the award is made is often the same as the country in which the award is issued and thus, in practice, courts have mainly referred to the country in which the arbitration took place.[17]

13. If the court is not satisfied that an application has been made before a "competent authority", within the meaning of articles V(1)(e) and VI, the request to adjourn proceedings will be denied. For example, the Luxembourg Court of Appeal dismissed a request for adjournment noting that there was no setting aside procedure pending in Belgium, the "court of the country of rendition".[18] Similarly, the Court of First Instance of Rotterdam refused an adjournment request based on a setting aside application pending in the Belgian courts on the ground that Israeli courts had exclusive jurisdiction to hear a setting aside application of an award issued in Israel.[19] The United States Court of Appeals for the District of Columbia held that where an arbitration occurred in London under the arbitration laws of England, the courts of England were the "competent authority with primary jurisdiction over the Final Award" and that, absent proceedings for the setting aside or suspension of the award in those courts, adjournment should be denied.[20] In that case, the court recalled that enforcement may be adjourned "only if [...] an application for the setting aside or suspension of the award has been made to a competent authority."[21]

14. In line with the principle that the party opposing enforcement of an arbitral award has the burden of proving that one or more of the defences under the Convention apply,[22] the burden of proving that the authority to which the application was made is competent to hear the application lies with the party seeking the adjournment. On that basis, the Supreme Court of New South Wales in *Hallen v. Angledal* refused to adjourn its decision on enforcement as it did not

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[16] See, for example, *Four Seasons Hotels and Resorts, B.V., et al. v. Consorcio Barr, S.A.*, District Court, Southern District of Florida, Miami Division, United States of America, 4 June 2003, 02-23249; *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167; *The Commercial Company for Investment v. Bell Rover Shipping Limited*, Court of Appeal of Cairo, Egypt, 19 March 1997, 68/113.

[17] For a detailed analysis of the case law, see the commentary on article V(1)(e) of the New York Convention.

[18] *Kersa Holding Company Luxembourg v. Infancourtage, Famajuk Investment and Isny*, Superior Court of Justice, Luxembourg, 24 November 1993. See also *The Commercial Company for Investment v. Bell Rover Shipping Limited*, Court of Appeal of Cairo, Egypt, 19 March 1997.

[19] *Isaac Glecer v. Moses Israel Glecer and, Estera Glecer-Nottman*, President of the District Court of Rotterdam, Netherlands, 24 November 1994, XXI Y.B. COM. ARB. 635 (1996).

[20] *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167.

[21] *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167.

[22] See, for example, *Encyclopaedia Universalis, S.A. v. Encyclopaedia Britannica, Inc.*, Court of Appeals, Second Circuit, United States of America, 31 March 2005, 403 F.3d 85. See also *Thai-Lao Lignite Co. Ltd. et al. v. Government of the Lao People's Democratic Republic*, District Court, Southern District of New York, United States of America, 3 August 2011, 10 Civ. 5256 (KMW); *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

"consider that the defendants have established that the necessary application has been made to competent authority in Sweden."[23]

c. Whether the party must request an adjournment and/or an order for security

15. Pursuant to article VI of the Convention, the authority before which the award is sought to be relied upon may order that the party opposing enforcement give suitable security "on the application of the party claiming enforcement". The language of article VI allows the courts to order security only if the party seeking enforcement so requests.

16. In *Spier*, the United States District Court for the Southern District of New York first noted that it should not order security since "neither party [...] had briefed the question of security", but still requested the defendant to show cause as to the reasons why security in the full amount should not be required, even though neither party had addressed the issue.[24] Since then, courts in the United States have consistently held that security should be ordered "on the application of the plaintiff".[25] In a recent case, the United States District Court for the Western District of Michigan recognized its power to order security under article VI, but refused to make such an order as the party opposing enforcement had failed to make the appropriate motion.[26]

17. It is thus accepted that article VI requires that the party seeking enforcement must "affirmatively" apply for security.[27]

18. Article VI does not however contain a similar requirement for courts adjourning proceedings. Courts may adjourn enforcement proceedings without any of the parties having applied for such an adjournment. For example, the English Court of Appeal held that, even though neither party had requested an adjournment, "a court might conclude of its own motion that the determination of an application under s. 103(5) [which directly incorporates and whose wording is equivalent to article VI] would be an inappropriate use of court time and/or contrary to comity or likely to give rise to conflict of laws problem."[28] In the United States, courts have

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[23] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999. See also *Four Seasons Hotels and Resorts, B.V., et al. v. Consorcio Barr, S.A.*, District Court, Southern District of Florida, Miami Division, United States of America, 4 June 2003, 02-23249.

[24] *Spier v. Calzaturificio Tecnica S.p.A ("Spier I")*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871.

[25] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[26] *Leonard Higgins v. SPX Corporation*, District Court, Western District of Michigan, United States of America, 18 April 2006, 2006 WL 1008677.

[27] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 434 (H. Kronke, P. Nacimiento et al. eds., 2010).

[28] *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

held that they have "inherent power to control [their] docket", irrespective of article VI of the Convention, and to stay the enforcement proceedings.[29]

19. Leading commentators have also noted that courts could, pursuant to article VI, decide *sua sponte* to adjourn enforcement proceedings.[30]

d. The discretionary power of the courts to adjourn the decision on enforcement or order security

20. Under article VI of the Convention, a court of a Contracting State "may, if it considers it proper, adjourn" proceedings and "may also [...] order the other party to give suitable security". In light of the "permissive language" of article VI,[31] courts have full discretion to adjourn enforcement proceedings or order the defendant to provide security. As noted by the Supreme Court of Hong Kong, use of the term "may" indicates that the application for adjournment is a matter of discretion.[32]

21. The fact that courts were granted full discretion in that respect has been widely recognized throughout the world. The President of the First Instance Court of Paris acknowledged, in *Saint-Gobain*, that article VI of the Convention gives discretion to the enforcing judge to decide whether enforcement proceedings should be adjourned when an application to set aside or suspend an award has been made to a competent authority in the country where the award was issued. Similar rulings have been rendered in many countries, including Canada, Italy, Germany, Sweden and the United States of America.[33] Australian courts have found that section 8(8) of the International Arbitration Act 1974 (which implements article VI of the Convention) gives them "wide discretion" or a "general discretion" to adjourn enforcement proceedings if they are satisfied that an application for the setting aside or

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[29] *Oriental Republic of Uruguay, et al. v. Chemical Overseas Holdings, Inc. et al.*, District Court, Southern District of New York, United States of America, 24 January 2006, 05 Civ. 6154 (WHP); *Belize Social Development Ltd. v. Government of Belize*, Court of Appeals, D.C. Circuit, United States of America, 13 January 2012, 10-7167; *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C.

[30] See e.g. Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 440 (R. Wolff ed., 2012); Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 79.

[31] See *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

[32] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[33] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096; *Nuovo Pignone SpA v. Schlumberger SA.*, Court of Appeal of Florence, Italy, 17 May 2005, XXXII Y.B. COM. ARB. 403 (2007); Oberlandesgericht [OLG] Schleswig, Germany, 16 June 2008, 16 Sch 02/07; *AB Götaverken v. General National Maritime Transport Company (GMTC), Libya and others*, Supreme Court, Sweden, 13 August 1979, VI Y.B. COM. ARB. 237 (1981); *Korea Wheel Corporation v. JCA Corporation*, District Court, Western District of Washington at Seattle, United States of America, 16 December 2005, C05-1590C; *China National Chartering Corp. et al. v. Pactrans Air & Sea Inc.*, District Court, Southern District of New York, United States of America, 13 November 2009, 06 Civ. 13107 (LAK); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF).

suspension of an award had been brought before a competent authority of the country in which, or under the law of which, the award was rendered.[34] Similarly, English courts consider that they have "wide" discretion[35] under article VI and are "unfettered when considering the exercise of [their] discretion".[36]

22. The courts' discretionary power applies not only to the decision to adjourn enforcement proceedings but also to whether a defendant should provide security and the amount of that security.[37]

23. Leading commentators agree that, on the basis of the permissive language used in article VI and the *travaux préparatoires*,[38] the decision to stay enforcement proceedings and/or order security is discretionary.[39]

B. The decision to grant or deny adjournment

a. The absence of a standard

24. The Convention does not provide any standard by which a court should decide whether to stay enforcement proceedings, thereby leaving courts in Contracting States to use their discretion.[40]

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[34] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, [2011] FCA 905; *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[35] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm). See also *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm).

[36] *Continental Transfer Technique Ltd v. Federal Government of Nigeria*, High Court of Justice, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm). In the United States, article VI has also been construed as granting "unfettered discretion" to adjourn pending the outcome of an application to set aside: see *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, District Court, Southern District of New York, United States of America, 11 March 1996, 95 Civ. 10279, XXII Y.B. COM. ARB. 958 (1997).

[37] *Spier v. Calzaturificio Tecnica S.p A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000); *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543; *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm); *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Island, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[38] See above at para. 4. See also a proposal of the Dutch delegate to the Conference, providing that the "judge in the country of enforcement must be given complete latitude either to grant an exequatur immediately, if he considered that there was no reason to refuse it, or to await the outcome of proceedings for its annulment instituted in the country in which it had been made." *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Eleventh Meeting, E/CONF.26/SR.11, at 5.

[39] See, e.g., GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2873-2874; W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 211; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 438 (R. Wolff ed., 2012); ALBERT JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958: TOWARDS A UNIFORM JUDICIAL INTERPRETATION (1981), at 353 and 358.

25. In the 1981 *Fertilizer Corporation of India* case, the United States District Court for the Southern District of Ohio noted that it had been unable to discover any standard on which to base an adjournment decision, other than to ascertain whether an application for the setting aside or suspension of the award had been brought before a competent authority of the country in which, or under the law of which, the award was made.[41] Similarly, the English High Court of Justice held that the 1996 Arbitration Act did not furnish a threshold test in respect of the exercise of the court's wide discretion pursuant to section 103(5) (which implements article VI of the Convention).[42]

26. It is widely recognized that discretion should be "rationally" exercised.[43] As stated by the United States Court of Appeals for the Second Circuit, "where a parallel proceeding is ongoing in the originating country and there is a possibility that the award will be set aside, a district court may be acting improvidently by enforcing the award prior to the completion of the foreign proceedings."[44]

27. In the absence of a recognized standard, certain jurisdictions had in the past adjourned enforcement proceedings on the sole basis that setting aside proceedings were pending before the competent authority, as defined in articles V(1)(e) and VI of the Convention. For example, in *Norsolor*, the Paris Court of Appeal suspended enforcement proceedings pending the outcome of an application to set aside the award before the Vienna Court of Appeal on the ground that, if the award were to be set aside in Vienna, the enforcement proceedings would be stripped of their object.[45] In the United States, the District Court for the Southern District of New York also adjourned enforcement proceedings in Spier by deference to the ruling of the competent authority.[46]

28. However, the Convention does not provide that enforcement proceedings are to be automatically stayed when a setting aside application is brought.[47] As

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[40] W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 220; Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 419 (H. Kronke, P. Nacimiento et al. eds., 2010).

[41] *Fertilizer Corp. of India (India) v. IDI Mgmt. Inc. (US)*, District Court, Southern District of Ohio, United States of America, 9 June 1981, C-1-79-570.

[42] *IPCO v. Nigerian National Petroleum Corp.*, High Court of Justice, England and Wales, 17 April 2008, [2008] EWHC 797 (Comm).

[43] *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm); Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 79.

[44] *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

[45] *Norsolor S. A. v Pabulk Ticaret Limited Sirket*, Court of Appeal of Paris, France, 15 December 1981. See also *C.C.M. SULZER v. Société Maghrébienne de Génie Civil (SOMAGEC), Société des Anciens Etablissements Riad Sahyoun (S.A.E.R.S.) et M. Riad Sahyoun*, Court of Appeal of Paris, France, 17 February 1987, 86.4767.

[46] *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871.

[47] Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 77; W. Michael

suggested by the *travaux préparatoires*, in appropriate circumstances, an award may be enforced despite a pending application to set it aside.[48]

29. In accordance with the discretionary power granted to courts of Contracting States under article VI, courts maintain the discretion to enforce an arbitral award even if setting aside proceedings are pending in the country where the award was issued. For example, courts in the United States have more recently held that they are not required to stay an action "merely because an action is pending in the originating country"[49] and that they "should not automatically stay enforcement proceedings on the ground that parallel proceedings are pending in the originating country".[50] Similarly, the Supreme Court of New South Wales has held that Australian courts should not stay an action to enforce an arbitration agreement merely because an action to set aside the award is pending before the competent authority.[51] In the words of the Supreme Court of New South Wales, "more must be established than that".[52]

30. Similarly, in recent years, French courts have repeatedly refused to adjourn enforcement proceedings under article VI of the Convention. In the 2004 *Bargues* case, the Paris Court of Appeal held that the potential setting aside of the award in the country where it is rendered does not impact the existence of the award in a way that would prevent its recognition and enforcement in other national legal orders and, as a result, that article VI "is of no use in the context of the recognition and enforcement of an award".[53]

b. Various factors considered by courts

31. Courts have been developing their own reasons in exercising their discretion and have considered a wide variety of factors when deciding whether to grant a request for adjournment. Those factors include the Convention's goal of facilitating the enforcement of arbitral awards and expediting dispute resolution, the likelihood of the party prevailing in the setting aside proceeding, the expected duration of the proceedings pending in the country where the award was issued, the potential hardship to parties, judicial efficiency and international comity.

32. Swedish and Australian courts have taken the view that the duration of annulment proceedings, as well as their chances of success, should be taken into account by a court deciding whether to adjourn enforcement proceedings under

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Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987) at 221.

[48] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

[49] *Sarhank Group v. Oracle Corporation*, District Court, Southern District of New York, United States of America, 9 October 2002, XXVIII Y.B. COM. ARB. 1043 (2003).

[50] *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, District Court, Southern District of New York, United States of America, 14 May 2003, XXVIII Y.B. COM. ARB. 1271 (2003). See also *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[51] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[52] Id.

[53] *Société Bargues Agro Industries SA v Société Young Pecan Company*, Court of Appeal of Paris, France, 10 June 2004, 2003/09894.

article VI. German and Dutch courts have assessed the chances of success of annulment proceedings and weighed the interests of the parties when considering whether an adjournment is appropriate. A similar approach was followed by the Grand Court of the Cayman Islands in *Republic of Gabon v. Swiss Oil Corporation*. In this case, the Grand Court considered the duration and the probability of success of the annulment proceedings pending before the Paris Court of Appeal. In light of the expected short duration of the French proceedings and the fact that the "serious grounds" advanced by the applicant suggested that the application was not "merely a delaying tactic", the Grand Court decided to adjourn the enforcement proceedings. It held that that adjournment would not cause "any very substantial further hardship on the plaintiff [i.e. the Republic of Gabon]" and that "if this court were to render its decision before that of the Paris Court in this instance it would run the risk of giving free rein to enforcement of an award which in a few days' time might no longer provide a valid basis for its action."[54] Similarly, the English High Court in *IPCO* found the following considerations to be relevant: whether the application before the court in the country where the arbitration took place is bona fide and not simply a delaying tactic, whether the application before the court in that country has at least a real (i.e., realistic) prospect of success, the extent of the delay occasioned by the potential adjournment and any resulting prejudice.[55]

33. In the United States, the Court of Appeals for the Second Circuit Court provided a non-exhaustive list of factors to be considered when deciding an adjournment request in *Europcar Italia SpA v. Maeillano Tours Inc*. These factors include the general objective of arbitration (i.e. the expeditious resolution of disputes and the avoidance of protracted and expensive litigation), the status of the foreign proceedings and the estimated time for resolving those proceedings, whether the award sought to be enforced would receive greater scrutiny in the foreign proceedings under a less deferential standard of review, the characteristics of the foreign proceedings, a weighing of the possible hardship caused to the parties, and any other circumstances that could shift the balance in favour of or against adjournment.[56]

34. A similar multi-factor approach was adopted in Canada by the Supreme Court of British Columbia in *Powerex Corp. v. Alcan Inc*.[57] In this case, the Supreme Court initially adjourned the proceedings after consideration of various factors, including whether the setting aside application in the United States was frivolous,

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[54] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[55] *IPCO v. Nigeria* (NNPC), High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[56] *Europcar Italia, S.p.A. v. Maiellano Tours Inc*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224. Subsequent decisions rendered in the United States applied these factors in determining whether or not enforcement proceedings should be adjourned: see, for example, *MGM Productions Group, Inc. v. Aeroflot Russian Airlines*, District Court, Southern District of New York, United States of America, 14 May 2003, XXVIII Y.B. COM. ARB. 127 (2003); *G. E. Transp. S.P.A. v. Republic of Albania*, District Court, District of Columbia, United States of America, 28 March 2011, 08-2042 (RMU); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 10-0003(PLF).

[57] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876. See also *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

whether an adjournment would inordinately delay the proceedings, and whether it would not be more convenient and efficient for a court in the United States to decide questions of domestic law. When the court in the United States dismissed the application to set aside the award, the decision was appealed by Alcan, and Powerex renewed its request for recognition and enforcement of the award. The Supreme Court of British Columbia held that the party seeking an adjournment must meet the threshold test of establishing that there is a "serious issue to be tried." In weighing the balance of convenience and irreparable harm, the court noted that it should consider a number of factors, including the estimated time to complete the case in the originating jurisdiction, whether the party opposing enforcement is "merely delaying the inevitable," whether a court in the originating jurisdiction has already refused to set aside the award, the availability of security and the possibility that the party resisting enforcement would hide or disperse its assets prior to enforcement, and the willingness of the party resisting enforcement to undertake diligent prosecution of the action in the originating jurisdiction.

c. Whether there are any prevailing factors to be considered by courts

35. Although courts tend to consider the same set of factors when deciding whether to adjourn enforcement proceedings, some of them are most commonly referred to and the decision to adjourn enforcement proceedings often depends in significant part on one or two of these factors.

36. Certain courts place significant weight on the estimated time required for annulment proceedings in the country where the award was issued. The Supreme Court of Victoria held that "the determinative factor is that the adjournment will be only for a relatively short time".[58] Courts applying this factor have denied enforcement when the decision on the setting aside application was "years rather than days away",[59] and granted it when the decision was expected within a matter of days or a couple of months.[60]

37. Likelihood of success in the setting aside proceedings is also an important factor relied upon by courts in determining whether to stay enforcement proceedings.[61]

38. In the United States, a survey of the relevant case law prior and subsequent to *Europcar* suggests that courts often grant or refuse adjournments depending primarily on their assessment of the chances of success of the setting aside

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[58] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000. See also, *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

[59] *Far Eastern Shipping Co. V. AKP Sovcomflot*, High Court of Justice, Queen's Bench Division (Commercial Court), England and Wales, 14 November 1994, XXI Y.B. COM. ARB. 699 (1996).

[60] See *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989); *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[61] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2876; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 441 (R. Wolff ed. 2012).

proceedings in the country where the award was issued.[62] A similar approach is found in other common law countries. In *Powerex Corp v Alcan Inc.*, the Supreme Court of British Columbia emphasised the "possibility of success" factor in determining whether enforcement proceedings should be adjourned. Similarly, the English Court of Appeal noted that one of the most important factors is "the strength of the argument that the award is invalid".[63]

39. A number of courts require that the party resisting enforcement provide evidence of a reasonable chance of success of the application to set aside the award. When courts find that the proceedings to set aside the award are frivolous and dilatory, they will enforce the award in the belief that the chances of obtaining a judgment to set aside the award are remote.[64]

40. Among the courts that have adjourned enforcement proceedings, the Supreme Court of Hong Kong held in *Hebei* that the party opposing enforcement had the burden of showing that a bona fide application had been made in the Beijing court and that there were grounds on which the Beijing court could reasonably set aside the award. The party opposing enforcement did not, however, need to show that it was likely to succeed in the Beijing proceedings. On the facts of the case, the court adjourned the proceedings pending the outcome of the application before the Beijing court on the ground that there was prima facie evidence indicating that the setting aside application had some prospect of success.[65] In *Powerex Corp v. Alcan Inc.*, the Supreme Court of British Columbia adjourned the enforcement proceedings on the ground that inter alia Alcan's action to set aside the award before the Oregon court was not frivolous and had an "arguable case which [was] not bound to fail".[66] In *IPCO*, the English High Court of Justice adjourned enforcement proceedings on the ground that the setting aside application had a "realistic prospect of success".[67] In *Toyo Engineering*, the Supreme Court of Victoria held that "it could not be stated with confidence that the impeachment application is unarguable" and, after noting

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[62] See *Fertilizer Corp. of India v. IDI Mgmt. Inc.*, District Court, Southern District of Ohio, United States of America, 9 June 1981, 517 F. Supp. 948; *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Ukrvneshprom State Foreign Economic Enterprise v. Tradeway, Inc.*, District Court, Southern District of New York, United States of America, 11 March 1996, 95 Civ. 10279, XXII Y.B. COM. ARB. 958 (1997).

[63] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208. See also *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of First Instance, Belgium, 25 January 1996; *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999; *Dowans Holding S.A. v. Tanzania Electric Supply Co. Ltd.*, High Court of Justice, England and Wales, 27 July 2011, [2011] EWHC 1957 (Comm); Oberlandesgericht [OLG] Celle, Germany, 20 November 2003, 8 Sch 02/03.

[64] Rena Rico, *Searching for Standards: Suspension of Enforcement Proceedings under Article VI of the New York Convention*, 1 ASIAN INT'L. ARB. JOURNAL 69 (2005), at 74.

[65] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court in the Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[66] *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 10 July 2003, 2003 BCSC 1096.

[67] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

the short expected duration of the setting aside proceedings, decided to adjourn the enforcement proceedings.[68]

41. While applying a similar approach, a number of courts have refused to adjourn enforcement proceedings. For example, in *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'investissements*, the Brussels Court of First Instance refused to adjourn proceedings, holding that the party opposing enforcement had not proven the existence of a "reasonable possibility of annulment".[69] Similarly, the Supreme Court of New South Wales refused to adjourn enforcement proceedings on the ground that the party opposing enforcement failed to provide "some evidence to show that there is a prima facie or reasonably arguable case" to set aside the award in the country where it was issued.[70] In Germany, the Higher Regional Court (*Oberlandesgericht*) of Celle refused to adjourn proceedings as it did not appear that the party resisting enforcement had a "prevailing interest" and the "prospects of success" of the application to set aside the award were "entirely uncertain".[71] In England, the High Court of Justice denied adjournment in *Far Eastern Shipping* on the ground that the "proceedings upon which the defendants rely to justify their application for a stay afford no more than a remote and uncertain prospect of recovery at best."[72]

42. A different approach has been adopted by some courts which have granted adjournments when the determination of the chances of success of a setting aside application involved issues of domestic law of the country where the application was pending. In *Construction Pioneers*, the United States District Court for the District of Columbia found that adjournment under article VI was proper as "for the court to decide this issue now, it would have to decide an intricate point of Ghana law that is more properly decided by a Ghana court." It held that "[i]f a final Ghanaian decision setting aside the Awards existed, the court would not be 'free as it sees fit to ignore [that] judgment'."[73] This is based on the notion that domestic courts are "better situated" to resolve domestic legal issues.[74] In the same vein, the

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[68] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[69] *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of First Instance, Belgium, 25 January 1996. This decision was upheld by the Brussels Court of Appeal: see *Inter-Arab Investment Guarantee Corporation v. Banque Arabe et Internationale d'Investissements*, Court of Appeal of Brussels, Belgium, 24 January 1997, XXII Y.B. COM. ARB. 643 (1997).

[70] *Hallen v. Angledal*, Supreme Court of New South Wales, Australia, 10 June 1999, 50055 of 1999.

[71] Oberlandesgericht [OLG] Celle, Germany, 20 November 2003, 8 Sch 02/03, at 554.

[72] *Far Eastern Shipping Co. V. AKP Sovcomflot*, High Court of Justice, Queen's Bench Division (Commercial Court), England and Wales, 14 November 1994, XXI Y.B. COM. ARB. 699 (1996), at 706.

[73] *CPConstruction Pioneers Baugesellschaft Anstalt v. The Government of the Republic Ghana, Ministry of Roads and Transport*, District Court, District of Columbia, United States of America, 12 August 2008, 1:04-01564(LFO); *Spier v. Calzaturificio Tecnica S.p.A*, District Court, Southern District of New York, United States of America, 29 June 1987, 663 F. Supp. 871; *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876.

[74] *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205,

United States District Court for the Southern District of New York stated that "the limited scope of review allowed under the Convention favors deference to proceedings in the originating country on the premise that a foreign court well versed in its own law is better suited to determine the validity of the award."[75]

43. Certain commentators have argued that the appropriate standard for determining whether to adjourn enforcement proceedings under article VI of the Convention should not be the mere possibility or even the probability of inconsistent judgments, but rather a balancing of the potential harm to the parties.[76] These commentators consider that the Convention refrains from stating that the operation of article VI depends upon the chances of success of the application to set aside the award and that, in light of the Convention's objective of facilitating and expediting the recognition and enforcement of foreign arbitral awards, the enforcing court retains independent discretion to either enforce or suspend enforcement of the award.

44. This approach has been endorsed in a number of decisions in which courts have balanced factors supporting adjournment against the Convention's main goal of facilitating and expediting the enforcement of foreign arbitral awards. In the words of the Federal Court of Australia, discretion must be weighed against the obligation of the Court to pay due regard to the objectives of the Act and "the spirit and intendment of the [Convention]".[77] Similarly, United States courts have held that courts must exercise their discretion in determining whether to adjourn or stay the confirmation of an arbitral award "by balancing the Convention's policy in favor of confirming such award against the principle of international comity embraced by the Convention"[78] and that the primary goal of the Convention to facilitate the recognition and enforcement of arbitral awards should weigh heavily on the district courts' determination.[79] In *AB Götaverken v. General National Maritime Transport Co.*, the Supreme Court of Sweden refused to adjourn enforcement proceedings pending the outcome of the judicial proceedings in France, "[h]aving regard to the general aim of the New York Convention [...] to facilitate the enforcement of

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XXV Y.B. COM. ARB. 1115 (2000). See also *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[75] *Sarhank Group v. Oracle Corporation*, District Court, Southern District of New York, United States of America, 9 October 2002, XXVIII Y.B. COM. ARB. 1043 (2003).

[76] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2876; Christoph Liebscher, *Article VI*, in NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS – COMMENTARY 438, at 443 (R. Wolff ed., 2012); W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 222 and 225.

[77] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, [2011] FCA 905.

[78] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, United States of America, 22 December 2005, 05-0423; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[79] *Europcar Italia, S.p.A. v. Maiellano Tours*, Court of Appeals, Second Circuit, United States of America, 2 September 1998, 97-7224.

foreign arbitral awards."[80] The President of the District Court of Amsterdam issued a similar ruling.[81]

45. This approach has been followed by a number of decisions applying a multi-factor approach — such as *Europcar Italia SpA v. Maeillano Tours Inc* (and subsequent decisions in the United States which considered the same factors)[82] — which invites courts to balance various factors in order to ascertain whether the rights of the parties are better preserved and protected through adjournment or enforcement.

C. The decision to order suitable security

46. A court that adjourns enforcement proceedings pursuant to article VI of the Convention "may also [...] order the other party to give suitable security". The Convention offers little guidance as to how this provision is to be applied, and instead provides the courts with a wide discretion to determine when to require security and in what amount and form.

47. The purpose of this provision is threefold. First, it seeks to avoid dissipation and concealment of assets pending the setting aside proceedings in the country where the award was rendered and thus guarantees that the award may be successfully enforced if the setting aside action is dismissed.[83] Second, it provides an incentive to the party resisting enforcement to proceed with its application to set aside or suspend the award "as expeditiously as possible",[84] thereby preventing delays.[85] Third, it provides the party seeking to enforce the award with adequate assurances of prompt payment once the dispute is resolved.[86]

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[80] *AB Götaverken v. General National Maritime Transport Company (GMTC), Libya and others*, Supreme Court, Sweden, 13 August 1979, VI Y.B. COM. ARB. 237 (1981).

[81] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[82] See e.g., *China National Chartering Corp. et al. v. Pacirans Air & Sea Inc*, District Court, Southern District of New York, United States of America, 13 November 2009, 06 Civ. 13107 (LAK); *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF); *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[83] See *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773. See also GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2877.

[84] *Continental Transfert Technique Ltd v. Federal Government of Nigeria*, High Court, England and Wales, 30 March 2010, [2010] EWHC 780 (Comm); *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[85] *Europcar Italia S.p.A. v. Alba Tours International Inc.*, Court of Justice of Ontario, Canada, 21 January 1997, CLOUT Case 366, XXVI Y.B. COM. ARB. 311 (2001).

[86] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, United States of America, 22 December 2005, 05-0423.

a. Relationship between adjournment and security

48. Notwithstanding the discretionary power granted to courts to adjourn enforcement proceedings and order security, most courts only consider ordering the party resisting enforcement to post security in situations where they decide to adjourn enforcement proceedings. As a result, adjournment is sometimes considered as a pre-condition for the ordering of security.[87]

49. Under article VI, only the party resisting enforcement can be ordered to provide security. In one reported case, a court decided that it was "justified that the claimants give security [...] for the case of anticipatory enforcement."[88] Several years later, another court in the same jurisdiction held that the Convention offers no basis to order security from the party seeking enforcement.[89] In 1993, a court in Germany held that pursuant to article VI of the Convention, a court may only order the party resisting enforcement to provide adequate security, but not the party seeking enforcement.[90] Since then, it appears that courts have consistently refused to order the party seeking enforcement to provide security as a condition for enforcing the award.[91]

50. The fact that courts of Contracting States only consider whether to order security when contemplating adjournment does not mean that those courts should always order the party resisting enforcement to provide suitable security when an adjournment is granted.

51. In practice, courts often order security when adjourning proceedings. As stated by the English Court of Appeal, security is the price to pay for adjournment and serves to protect the party seeking enforcement.[92]

52. In *IPCO*, the English High Court of Justice held that it had jurisdiction, pursuant to section 103(5) of the 1996 Arbitration Act (implementing article VI of the Convention), to make adjournment of the decision on the enforcement of the award conditional upon the giving of security.[93] In the United States, courts also require the party opposing enforcement to provide suitable security as a condition

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[87] *Gater Assets Ltd v. Nak Naftogaz Ukrainiy*, Court of Appeal, England and Wales, 17 October 2007, [2007] EWCA Civ 988; *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[88] *Henri Lièvremont and v. Adolphe Cominassi, Maatschappij voor Industriele Research en Ontwikkeling B.V.*, President of Rechtbank, Court of First Instance of Zutphen, Netherlands, 9 December 1981, VII Y.B. COM. ARB. 399 (1982).

[89] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[90] Oberlandesgericht [OLG] Frankfurt, Germany, 10 November 1993, 27 W 57/93. See also *Powerex Corp., formerly British Columbia Power Exchange Corporation v. Alcan Inc., formerly Alcan Aluminum Ltd.*, Court of Appeal of British Columbia, Canada, 4 October 2004, 2004 BCCA 504.

[91] See e.g., *Gater Assets Ltd v. Nak Naftogaz Ukrainiy*, Court of Appeal, England and Wales, 17 October 2007, [2007] EWCA Civ 988; *Yukos Oil Co v. Dardana Ltd.*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[92] *Yukos Oil Co v. Dardana Ltd*, Court of Appeal, England and Wales, 18 April 2002, [2002] EWCA Civ 543.

[93] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

for granting an adjournment.[94] In *Nedagro*, the United States District Court for the Southern District of New York refused to require the posting of security given that the defendant had already provided "suitable security" by attaching property in the amount due.[95] In the Netherlands, the President of the District Court of Amsterdam denied a request for adjournment on the ground that the defendant "had not shown any readiness to give suitable security".[96]

53. In cases where the courts have found adjournments to be conditional on the posting of security,[97] courts have held that if the party resisting enforcement failed to provide the ordered security within the timeframe provided by the court, the court may decide to proceed with the enforcement.[98] As stated by the United States District Court for the Southern District of New York in *Spier*: "[I]f a party such as [the defendant] fails to post security, then it would seem that the proper remedy would be to deny its application for an adjournment of the decision."[99]

54. Courts in Australia and Canada have also ordered security when adjourning enforcement proceedings.[100] In *Toyo*, the Supreme Court of Victoria held that the adjournment "will be subject to an undertaking by [the party resisting enforcement] that it will diligently prosecute its application in Singapore and, further, subject to a condition that suitable security be given by it for the unpaid amount of the award including interest to the adjourned date of the enforcement application."[101]

55. This approach finds some support in the *travaux préparatoires* which state that adjournment may be granted "only on the condition that the party opposing enforcement deposits a suitable security."[102] This view is shared by some

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[94] See e.g., *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois, Eastern Division, United States of America, 12 April 2005, 04 C 773; *Nedagro B.V. v. Zao Konversbak*, District Court, Southern District of New York, United States of America, 21 January 2003, 02 Civ. 3946 (HB); *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Consorcio Rive, S.A. de C.V., Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[95] *Nedagro B.V. v. Zao Konversbak*, District Court, Southern District of New York, United States of America, 21 January 2003, 02 Civ. 3946 (HB).

[96] *Southern Pacific Properties v. Arab Republic of Egypt*, President of the District Court of Amsterdam, Netherlands, 12 July 1984, X Y.B. COM. ARB. 487 (1985).

[97] *Consorcio Rive, S.A. de C.V. v. Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[98] *Ingaseosas International Co. v. Aconcagua Investing Ltd.*, Court of Appeals, Eleventh Circuit, United States of America, 5 July 2012, 11-10914; *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998).

[99] *I. Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839.

[100] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000. See also, *Powerex Corp. v. Alcan Inc.*, Supreme Court of British Columbia, Canada, 30 June 2004, 2004 BCSC 876.

[101] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000.

[102] *Travaux préparatoires*, United Nations Conference on International Commercial Arbitration, Summary Record of the Seventeenth Meeting, E/CONF.26/SR.17, at 4.

commentators who consider that, in order to safeguard the rights of the party seeking enforcement, it should always be a condition of a stay that the party resisting enforcement provides security.[103]

56. Still, in light of the permissive language of article VI, which provides that courts may, within the ambit of their discretion, decide whether or not to order security, a number of courts have, as is evidenced below, decided to adjourn enforcement proceedings without ordering security.

b. Factors considered by courts in deciding whether to order "suitable security"

57. In deciding whether to order that the party resisting enforcement give security, courts usually consider various factors, including the likelihood of success of the petition to set aside or suspend the award, the likelihood that assets will still be available if enforcement is delayed, and the relative hardship caused to the parties by the order.

58. English courts take into account the likelihood that the award will be set aside in the country where it was issued and that assets will still be available if the court decides to adjourn the enforcement proceedings. In *Soleh Boneh*, the English Court of Appeal held that two important factors must be considered: the strength of the argument that the award is invalid and the "ease or difficulty of enforcement of the award".[104] As to the strength of the award, the court stated that "[i]f the award is manifestly invalid, there should be an adjournment and no order for security; if it is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security." A similar approach was adopted in *APIS AS v. Fantazia*.[105] In *IPCO*, the Court of Appeal overturned the lower court's decision ordering security on the basis that there was little risk of dissipation of assets and that the party resisting enforcement had a strong case in the setting aside proceedings.[106]

59. Similarly, the High Court of Hong Kong considered the same factors in *Karaha Bodas Co. v. Perusahaan Minyak Dan Bumi Negara (Pertamina)*. After noting that the uncertain merits of Pertamina's case "appear [...] to weigh in favour of KBC's application for security", the High Court turned to the difficulty of enforcement and found that requiring Pertamina to pay a substantial amount in the short period of time remaining before the enforcement hearing in Hong Kong could have a "seriously adverse and unnecessarily unjust effect on Pertamina's position", while the absence of security would have "little adverse effect on KBC's position in the Hong Kong litigation" given Pertamina's substantial assets throughout the

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[103] GARY B. BORN, INTERNATIONAL COMMERCIAL ARBITRATION (2009), at 2877; W. Michael Tupman, *Staying Enforcement of Arbitral Awards under the New York Convention*, 3 ARB. INT'L. 209 (1987), at 223.

[104] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[105] *Apis AS v. Fantazia Kereskedelmi KFT*, High Court of Justice, England and Wales, 21 September 2000, [2001] 1 All ER (Comm).

[106] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

world. Accordingly, the High Court refused to order Pertamina to give security.[107] In *Hebei*, the Supreme Court of Hong Kong dismissed the application to order security on the ground that the defendant was a "substantially local company with ample assets and that there was no reason to suppose that any risk existed for the plaintiff to be protected by an order of security."[108]

60. In the Cayman Islands, the Grand Court declined to order security in light of the "impracticability" of requiring the effective provision of security by the defendant within the short period of time remaining before the decision of the Paris Court of Appeal in the setting aside proceedings.[109]

61. Courts in the United States do not assess the likelihood of the award being set aside when determining whether to order security, but rather focus on the effect a security order would have on the parties. In *Jorf*, the District Court for the Western District of Pennsylvania refused to order that the defendant give security on the ground that while there was no indication that the plaintiff had suffered financial hardship as a result of its inability to immediately enforce the award (notwithstanding that it had gone nearly a year without being able to access the money owed under the award), the security order would cause "real harm" to the defendant.[110]

62. Certain courts in the United States have assessed whether a sovereign state or its instrumentalities could be ordered to give security. In 1997, the District Court for the Southern District of New York found that article VI of the Convention allowed it to require sovereigns to post pre-judgment security if they moved to set aside or suspend an arbitral award.[111] In a recent decision, the District Court for the District of Columbia refused to require the Republic of Honduras "a sovereign state that presumably is solvent and will comply with legitimate orders issued by courts in this country or in Honduras" to post any security.[112]

c. Form and amount of the security

63. Courts determine at their own discretion the amount and form of the security to be posted by the party resisting enforcement.

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[107] *Karaha Bodas Co. LLC v. Perusahaan Pertambangan Minyak Dan Gas Bumi Negara – Pertamina*, High Court of the Hong Kong Special Administrative Region, Hong Kong, 20 December 2002, XXVIII Y.B. COM. ARB. 752 (2003).

[108] *Hebei Import & Export Corp v. Polytek Engineering Co Ltd.*, High Court, Supreme Court of Hong Kong, Hong Kong, 1 November 1996, [1996] 3 HKC 725.

[109] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Island, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[110] *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, Unites States of America, 22 December 2005, 05-0423. See also *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773.

[111] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998).

[112] *DRC Inc. v. Republic of Honduras*, District Court, District of Columbia, United States of America, 28 March 2011, 10-0003 (PLF).

64. In most jurisdictions, courts order defendants to provide either a bank guarantee,[113] a deposit of a given amount in an escrow account,[114] a bond or other form of equally satisfactory security.[115] As noted by a commentator, courts have expressed a preference for cash paid into escrow accounts or internationally recognized instruments of payment.[116]

65. In *Spier*, the United States District Court for the Southern District of New York refused to allow the Italian party resisting enforcement to post a guarantee in an Italian Bank, holding that "the party seeking to enforce the award is entitled to security giving him a direct claim against either property or a guarantor resident in the country of enforcement", whereas the security suggested by the party resisting enforcement "could only be issued under and subject to Italian law" and would therefore be subject to "the inherent risk of further proceedings in Italy". The District Court therefore suggested that the party resisting enforcement either post a bond or issue "an irrevocable letter of credit from a bank located in New York".[117]

66. In determining the amount of the security, courts have adopted different approaches which have taken into account the expected value of the award, the solvency of the party resisting enforcement, and the disincentive effect the security would have on a party considering dilatory tactics.[118] Courts often order security in the amount of the entire award and require that any interest made on the security go to the party seeking enforcement so as to protect its economic interests.[119]

67. In England, courts rarely grant security in the full amount of the award when the award is likely to be set aside by the competent authority in the country where it was issued.[120] As stated by the Court of Appeal in *Soleh*, "if the award is manifestly valid, there should either be an order for immediate enforcement, or else an order for substantial security." Similarly, the Federal Court of Australia, referring to *Soleh*, ordered the party resisting enforcement to provide "substantial security".[121]

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[113] *Apis AS v. Fantazia Kereskedelmi KFT*, High Court of Justice, England and Wales, 21 September 2000, [2001] 1 All ER (Comm).

[114] *The Republic of Gabon v. Swiss Oil Corporation*, Grand Court, Cayman Islands, 17 June 1988, XIV Y.B. COM. ARB. 621 (1989).

[115] *Consorcio Rive, S.A. de C.V., Briggs of Cancun, Inc., David Briggs Enterprises, Inc.*, District Court, Eastern District of Louisiana, United States of America, 26 January 2000, 99-2205, XXV Y.B. COM. ARB. 1115 (2000).

[116] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 435 (H. Kronke, P. Nacimiento et al. eds., 2010).

[117] *I. Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839.

[118] Nicola C. Port, Jessica R. Simonoff et al., *Article VI*, in RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: A GLOBAL COMMENTARY ON THE NEW YORK CONVENTION 415, at 435 (H. Kronke, P. Nacimiento et al. eds, 2010).

[119] *Toyo Engineering Corp v. John Holland Pty Ltd.*, Supreme Court of Victoria, Australia, 20 December 2000, 7565 of 2000; *Alto Mar Girassol v. Lumbermens Mutual Casualty Company*, District Court, Northern District of Illinois Eastern Division, United States of America, 12 April 2005, 04 C 773; *Europcar Italia S.p.A. v. Alba Tours International Inc.*, Court of Justice of Ontario, Canada, 21 January 1997, CLOUT Case 366, XXVI Y.B. COM. ARB. 311 (2001).

[120] *Soleh Boneh International Ltd v. Government of the Republic of Uganda and National Housing Corporation*, Court of Appeal, England and Wales, 12 March 1993, [1993] 2 Lloyd's Rep 208.

[121] *ESCO Corp v. Bradken Resources Pty Ltd.*, Federal Court, Australia, 9 August 2011, NSD 876 of 2011.

In *IPCO*, the English High Court of Justice ordered security in the amount of a percentage of the award and the immediate payment of the amount that was "indisputably due".[122]

68. As to the timeframe for posting security, reported cases suggest that courts usually order the relevant party to post security within a 20-30 day period.[123] This period may be longer depending on the form of the security.[124]

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[122] *IPCO v. Nigeria (NNPC)*, High Court of Justice, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[123] *Skandia America Reinsurance Corporation v. Caja Nacional de Ahorro y Seguros*, District Court, Southern District of New York, United States of America, 21 May 1997, 96 Civ. 2301 (KMW), XXIII Y.B. COM. ARB. 956 (1998); *Jorf Lasfar Energy Company, S.C.A. v. AMCI Export Corporation*, District Court, Western District of Pennsylvania, Unites States of America, 22 December 2005, 05-0423; *IPCO v. Nigeria (NNPC)*, High Court, England and Wales, 27 April 2005, [2005] EWHC 726 (Comm).

[124] See *Martin Spier v. Calzaturificio Tecnica S.p.A.*, District Court, Southern District of New York, United States of America, 12 September 1988, 1988 WL 96839: in this case, the court directed the defendant to issue a letter of credit within ninety days.